

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application of:

Applicant : Keeler, Sr.
Serial No. : 10/691,480
Filed : October 21, 2003
Title : METHOD FOR PACKAGING CRABMEAT
Docket : 424532-00002
Examiner : Jyoti Chawla
Art Unit : 1761

Commissioner for Patents
Post Office Box 1450
Alexandria, Virginia 22313-1450

DECLARATION OF JOHN KEELER, SR. UNDER 37 C.F.R. § 1.132

I, John Keeler, Sr., declare and state:

1. I am the inventor of the above-identified patent application.
2. I am no longer employed by the assignee, John Keeler & Co., Inc. (d/b/a/ Blue Star Food Products).
3. I have a Bachelors of Science degree in Industrial Engineering and a Masters of Science degree in Chemical Engineering.
4. I have worked in the crabmeat packaging industry for over 17 years. My work in the crabmeat packaging industry has focused primarily on quality assurance and regulatory compliance issues.
5. I have read and understand the contents of the above-identified patent application, which claims a packaged crabmeat product and related method for packaging crabmeat. I am particularly familiar with pending claims 3-5, 7, 10, 12, 13, 15 and 18. Claim 10 reads as follows:

A packaged crabmeat product comprising:

a flexible pouch;

a volume of crabmeat placed into said flexible pouch; and

a volume of ambient air within said flexible pouch, said volume of ambient air providing an ambient air to crabmeat ratio within said flexible pouch of about 13-20% by volume such that anaerobic bacterial growth is prevented, wherein said flexible pouch is sealed and pasteurized.

6. Each claim of the pending application requires, among other things, an ambient air to crabmeat ratio of about 13 to 20 percent by volume.
7. I have read and understand the Office action dated October 4, 2007 in which claims 3-5, 7, 10, 12, 13, 15 and 18 are rejected under 35 U.S.C. § 103(a) as being unpatentable over the combination of (1) U.S. Patent No. 5,268,189 to Doerter (herein "Doerter"), (2) Peterson, M. E., G. A. Pelroy, F. T. Poysky, R. N. Paranjpye, F. M. Dong, G. M. Pigott and M. W. Eklund. "Heat-Pasteurization Process for Inactivation of Nonproteolytic Types of *Clostridium botulinum* in Picked Dungeness Crabmeat." *Journal of Food Protection* 60(8) (1997): 928-934 (herein "Peterson"), (3) U.S. Patent No. 2,546,428 to Byrd (herein "Byrd"), (4) Air Liquide Canada, "Packaging and Preserving Fish and Sea Products" (Abstract Only) (herein "Air Liquide") and (5) U.S. Patent No. 4,840,805 to Sugisawa et al. (herein "Sugisawa"), claims 3-5, 7, 10, 12, 13, 15 and 18 are rejected under 35 U.S.C. § 103(a) as being unpatentable over the combination of (1) U.S. Patent Pub. No. 2002/0061412 to Ueyama et al. (herein "Ueyama"), (2) Peterson, (3) Air Liquide and (4) Sugisawa, claims 3-5, 7, 10, 12, 13, 15 and 18 are rejected under 35 U.S.C. § 103(a) as being unpatentable over the combination of (1) GB 2,343,611 to Lett et al. (herein "Lett"), (2) Peterson, (3) Air Liquide, (4) Doerter and (5) Sugisawa, and claims 3-5, 7, 10, 12, 13, 15 and 18 are rejected under 35 U.S.C. § 103(a) as being unpatentable over the combination of (1) U.S. Patent No. 3,852,486 to Walker et al. (herein "Walker"), (2) Ueyama and (3) Sugisawa.

8. I have read and understand the decision of the Board of Patent Appeals and Interferences dated May 6, 2009 in which all rejections in the Office action dated October 4, 2007 were affirmed.

9. In making the rejections, the Office notes that Sugisawa teaches:

When the broiled fish is to be hermetically packaged in the container, the broiled fish is placed in the container which is then sealed at suitable positions by heat sealing or adhesion. It is preferable that the broiled fish be packaged in the container under vacuum from the viewpoint of improving the sterilization effect during the heat sterilization. It is particularly preferable to conduct vacuum packaging so that the air content is 25% or less, preferably 15% or less, relative to total volume of air and the broiled fish in the container, because the sterilization effect obtained during the heat sterilization is improved, and the effect of preventing the flow of drips from the fish and the breaking of the fish meat during the heat sterilization is also improved.

(Sugisawa, col. 3, ll. 3-16.)

10. Thus, the Office contends that it would have been obvious to modify a flexible pouch containing crabmeat, as taught by Peterson, to include ambient air and crabmeat at an ambient air to crabmeat ratio of about 13 to 20 percent by volume based upon the teachings of Sugisawa.

11. For at least the following reasons, the teachings of Sugisawa would not lead a person having ordinary skill in the art to modify a flexible pouch containing pasteurized crabmeat to include ambient air, let alone an ambient air to crabmeat ratio of about 13 to 20 percent by volume.

12. Sugisawa's teachings are limited to packaging sterilized, dried, broiled fish. Specifically, Sugisawa expressly states that "[t]he inventors of the present invention have *specifically limited* the food to broiled fish and have concentrated on a technique for increasing the preservative capability thereof by a heat sterilizing treatment."

- (Col. 1, ll. 14-19 (emphasis added).) Therefore, on its face, Sugisawa's teachings are limited to sterilized broiled fish.
13. A person skilled in the art would not consider the teachings of Sugisawa to be relevant to the crabmeat packaging industry, certainly not to the pasteurized crabmeat packaging industry. Sugisawa is directed to a different field of endeavor – the packaging of sterilized, dried, broiled fish.
14. Crabmeat is not fish. Crabmeat is harvested from crabs, which are crustaceans, i.e., invertebrate animals with hard exoskeletons and jointed legs. Fish is meat harvested from fish, i.e., aquatic vertebrates with fins. While crustaceans are sometimes referred to as “shellfish,” the presence of the word “fish” in the word “shellfish” does not render a shellfish a fish – as indicated above, fish are vertebrates with fins.
15. The microbiological properties of crabmeat are uniquely different than the microbiological properties of fish. Most notably, crabmeat typically carries a greater concentration and variety of bacterial flora than fish and, therefore, crabmeat spoils easier and quicker than fish.
16. Furthermore, the texture that typical consumers expect of crabmeat is much different than the texture expected of fish. The typical consumer expects crabmeat to have a soft, delicate texture, a natural color and a sweet taste, which are best preserved by pasteurization. Fish is expected to be flakey and, therefore, can be sterilized. Sterilization is a harsher process than pasteurization and, therefore, is not a desirable heat treatment process for crabmeat. Specifically, sterilized crabmeat loses its natural texture, color and taste. As such, sterilized crabmeat is typically infused with various chemical agents to preserve color. However, such chemical agents adversely affect the taste of the treated crabmeat.
17. Thus, the packaging considerations for crabmeat are different than the packaging considerations for fish. Furthermore, the considerations for pasteurized crabmeat are different than the considerations for sterilized crabmeat. A person having ordinary

skill in the art would not be inclined to modify a flexible pouch containing pasteurized crabmeat based upon Sugisawa's teachings regarding sterilized fish.

18. Sugisawa teaches that "[i]t is particularly preferable to conduct vacuum packaging so that the air content is 25% or less, preferably 15% or less, relative to total volume of air and the broiled fish in the container." (Sugisawa, col. 3, ll. 9-12.) When read in context, this portion of Sugisawa instructs the reader to remove air from the package to improve "the sterilization effect." (Col. 3, l. 8.) Therefore, Sugisawa teaches that vacuum packaging may be used to improve sterilization.
19. Sterilization is improved by vacuum packaging because vacuum packaging removes air from the package. Air is an insulator – it slows the transfer of heat to the fish from the surrounding sterilization unit. The more air in a package, the longer it takes to heat the fish in the package to the desired sterilization temperature. Inversely, less air in the package means less insulation, greater heat flux and, consequently, improved sterilization. The improvement in sterilization effect is directly related to the amount of air removed from the package.
20. A person of ordinary skill in the art reading Sugisawa's teaching that sterilization is improved when the air content in the package "is 25% or less, preferably 15% or less" would be led to remove as much air from the package as possible. Sugisawa provides these values as a tolerance range, i.e., a maximum amount of air, not as a calculated minimum amount of air. Nothing in Sugisawa would direct a person having ordinary skill in the art to intentionally leave a certain minimum quantity of air in the package.
21. The Office also contends that Air Liquide would direct a person of ordinary skill in the art to leave a minimum amount of air in Sugisawa's package. This is not correct.
22. Air Liquide teaches the use of a modified gaseous atmosphere that includes oxygen, wherein the oxygen is present to inhibit anaerobic bacterial growth. However, Air Liquide is directed to packaging fresh fish and sea products. The packaged fish and sea products are never subjected to a heat treatment process, such as sterilization or pasteurization. Therefore, the need for effective and efficient heat transfer is not an

issue for the Air Liquide package. Nor is package bloating and rupture an issue for the Air Liquide package – the package is not heat treated and, therefore, there is no concern about the gases contained in the package expanding.

23. Therefore, a person having ordinary skill in the art would not be motivated to combine Air Liquide's teachings regarding packaging fresh fish and sea products with Sugisawa's teachings regarding sterilized, dried, broiled fish.

24. I further declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code.

FURTHER DECLARANT SAYETH NAUGHT.

Signed: _____

John Keeler, Sr.

Date: _____

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June 30th, 2009